



## Alerts

### Disqualification Not Warranted Where Attorney Was Involved in Prior Real Estate Transaction Between Two Parties That Resulted in a Legal Dispute

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*Lynn v. George* (2017) 2017 Cal. App. LEXIS 817

#### Brief Summary

The California Court of Appeal for the Fourth District held in an action arising from an alleged partnership for buying and selling real property that defendant's longstanding counsel should not have been disqualified because substantial evidence did not support a finding of a prior confidential nonclient relationship with the plaintiff and that the mere potential of a prior attorney-client relationship with plaintiff was insufficient to warrant disqualification.

#### Complete Summary

The plaintiff ("ALR") and defendant ("REPM") were real estate companies that allegedly agreed to form a partnership for the purpose of purchasing and flipping properties. ALR alleged that a partnership was formed; REPM maintained that ALR was one of several real estate brokers retained by REPM to represent it in buying and selling properties. REPM's counsel ("Counsel") had been its counsel for several years. In December 2013, either the alleged partnership or REPM purchased three pieces of property ("the properties"). Sometime in early 2015, negotiations commenced for selling one of the properties to another real estate investment firm. Counsel represented the seller (either the alleged partnership or REPM) in the negotiations. During the course of the negotiations, Counsel communicated with ALR several times by e-mail, copied ALR on some e-mails sent to REPM, and spoke with ALR's representative at least once by telephone. The proposed sale did not go through. The relationship between REPM and ALR deteriorated and ALR sued REPM for breach of partnership agreement, breach of fiduciary duty, fraud, and other causes of action. The complaint alleged, among other things, that REPM refused reasonable offers for the purchase and sale of the properties, collected rental income from the properties and withheld that income from the alleged partnership, tried to oust ALR from the alleged partnership, and failed to correctly compute partnership profits.

ALR moved to disqualify Counsel, arguing that they had an attorney-client relationship with Counsel since she was counsel to the alleged partnership. Alternatively, they argued that Counsel assumed fiduciary duties to them as nonclients. The trial court granted the motion based on a finding of a

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"confidential nonclient relationship" and a finding of a *potential* attorney-client relationship with the "alleged partnership."

The court of appeal reversed. The court began with the general rule that where an attorney successively represents clients with adverse interests, and where the subjects of the two representations are substantially related, the need to protect the first client's confidential information requires that the attorney be disqualified from the second representation. With respect to a conflict arising from a "confidential nonclient relationship, the court said that "an attorney may be subject to disqualification when the attorney owes a duty to a nonclient to preserve confidential information[.]" The relevant issue was whether substantial evidence existed that Counsel obtained confidential information from ALR or that Counsel and ALR had formed a confidential relationship. After a detailed review of all of the evidence submitted, comprising of email exchanges and declarations concerning conversations with Counsel, the Court concluded, "none of the communications disclosed any information to [Counsel] that was confidential to [ALR]. . . . [because the] information disclosed was shared with persons other than Counsel, and therefore was not confidential, or was related to her role as the broker for the transaction. There is nothing in the evidence of the communications to suggest that [Counsel] may have acquired confidential information from [ALR]." The court also reasoned that "[a] confidential relationship . . . could not have been formed because, as the trial court found, the only advice given [to ALR] related to her obligations as broker for the seller of [the properties.]"

With respect to the second ground, the court held that "[a] mere potential attorney-client relationship with an alleged partnership is not enough to overcome "[t]he important right" of [REPM and its principal] to their long-standing counsel of choice."

### **Significance of Opinion**

This decision signifies the appellate court's instruction to trial courts to scrutinize the evidence submitted in connection with a motion to disqualify in light of the tension between the clients' right to counsel of their choice and the need to maintain ethical standards of professional responsibility. This means that "substantial evidence" must be submitted even with respect to the threshold question of the existence of a prior confidential or attorney/client relationship. If this burden is not met, the court does not reach the issue of whether the representations are substantially related.

For more information, please contact [Terrence McAvoy](#) or [Cassidy Chivers](#)

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